

Supreme Court, U. S.

FILED

AUG 12 1977

MICHAEL RODAK, JR., CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

No. ....**77-238**

THE PEOPLE OF THE STATE OF MICHIGAN,  
Petitioner,  
vs.  
RICHARD BERT MOSLEY,  
Respondent.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF MICHIGAN

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Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on June 2, 1977.

### OPINIONS BELOW

The opinion of the Michigan Court of Appeals, Division I, is reported at 72 Mich App 289; 249 NW 2d 393 (1976) and is appended as Appendix "A". The Opinion of the Michigan Supreme Court is reported at 400 Mich 181; 254 NW 2d 33 (1977), and is appended as Appendix "B".

### STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals reversing Respondent's conviction was entered on November 22, 1976. On June 2, 1977, in lieu of granting Respondent's application for leave to appeal, the Michigan Supreme Court affirmed the Court of Appeals on a different ground, holding that Respondent's arrest was without probable cause and his confession was therefore inadmissible upon retrial. The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3), and California v Stewart, decided sub nom, Miranda v Arizona, 384 US 436, 498, N 71; 86 S Ct 1602, 16 L Ed 2d 694 (1966).

### QUESTION PRESENTED

I.

Whether Brown v Illinois, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975) requires suppression of a voluntary inculpatory statement where the initial police action cannot be characterized as flagrant or purposeful misconduct, and where prior to questioning other circumstances intervened, specifically the statement of an accomplice which named Respondent as the murderer.

### CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person...shall be compelled in any criminal case to be a witness against himself,....

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



The Fourteenth Amendment to the United States Constitution provides in pertinent part:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### STATEMENT OF FACTS

Respondent was convicted of first degree felony-murder. Respondent was arrested on April 8, 1971, at 1:05 p.m. for an unrelated robbery on the basis of an anonymous telephone call (R 448). The arresting officer testified that he also consulted "pattern sheets" on lower eastside robberies before arresting respondent. (Pattern sheets contain brief reports of recent crimes with descriptions given by victims and witnesses.) The officer felt Respondent fit the description of a person involved in two robberies. The trial court impliedly ruled the arrest proper, (the issue was raised and the confession admitted), as did the Michigan Court of Appeals, splitting 2-1 on the issue. The Michigan Supreme Court subsequently held the arrest to be without probable cause.

The arresting officer, Detective James Cowie of the Armed Robbery Section of the Detroit Police Department, conveyed Respondent to the Robbery, Breaking and Entering Bureau on the 4th floor of police headquarters.

Cowie informed Respondent Mosley of his Miranda rights. Respondent signed a Constitutional

Rights Certificate of Notification acknowledging the giving of those rights and stated he completely understood his rights. Cowie then asked Respondent about a particular robbery, the White Tower robbery.

Detective Cowie talked with Respondent Mosley for only twenty minutes and the questioning ceased when Respondent declined to talk about the White Tower robbery. At no time did Respondent request an attorney pursuant to the rights contained in the Miranda warnings. Cowie then took Respondent Mosley from the 4th floor Armed Robbery Bureau to the 9th floor cell block area, the time of said transfer being approximately 4:00 p.m.; and except for informing Respondent that Detective Gilbert Hill of the Homicide Bureau would speak with him, Cowie had no further contact with Respondent.

At 3:50 p.m. on the same day, April 8, 1971, Detective Hill took a statement from one Anthony Smith admitting complicity in the robbery of Leroy Williams, and naming Respondent as the shooter (R 88-89).

Thereafter, at about 6:20 p.m., Respondent Mosley was taken from the 9th floor cell block area to the 5th floor Homicide Bureau by Homicide Detective Gilbert Hill. Hill saw Respondent to interrogate him regarding the robbery-murder of Leroy Williams which had occurred some three months earlier. Prior to questioning, Hill again informed Respondent Mosley of his Miranda rights and the purpose of the interrogation. Respondent Mosley again indicated that he understood his rights and executed a signed Miranda rights form. At no time did he request counsel. Detective Hill then proceeded to question Respondent relative to the murder of Leroy Williams (R 104).

Respondent Mosley denied, "almost immediately," any involvement in the murder (R 104).

Hill then informed Respondent that Anthony Smith had made a statement naming Respondent Mosley as the "shooter" in the slaying, whereupon Respondent heaved a sigh and stated that he would tell Hill about the killing. He then made a statement, which he signed, admitting his role in the murder as well as the circumstances prior and subsequent to the shooting (R 487-490).

Respondent Mosley testified that he was in fact apprised of his Miranda rights by Sergeant Cowie prior to being questioned about the robberies for which he was arrested. Respondent also stated that upon being asked about the robberies he elected to exercise his right to remain silent at which time the interrogation by Cowie was forthwith terminated (R 558-559, 569-571).

Defendant Mosley also acknowledged that Detective Hill had informed him that Hill's interrogation concerned the Leroy Williams murder; Respondent also admitted that Hill had in fact apprised him of his Miranda rights prior to questioning (R 560-561). Respondent also stated that the reason he confessed was due to the fact that Detective Hill told him that co-felon Anthony Smith had put all the blame on him and not because he was coerced or because he did not understand his rights or because he had been denied an attorney (R 580). In fact, Respondent specifically testified at trial that he was not physically abused or threatened into making a statement.

The trial judge ruled that Respondent Mosley's confession was voluntarily tendered and thus admissible in evidence and said confession was used against Respondent at trial (R 482, 487-490).

Respondent's conviction was reversed by a three-judge panel of the Michigan Court of Appeals,

Division I, under date of January 14, 1974. The Michigan Appellate Court found that defendant Mosley was in fact twice apprised of his Miranda rights by Detectives Cowie and Hill. However, the Michigan court held that, based on the dictates of Miranda v Arizona, 384 US 436 at 473-474; 86 S Ct 1602 at 1627-1628; 16 L Ed 2d 694 at 723 (1966), all interrogation of respondent should have ceased when he declined to answer Detective Cowie's questions.

This Court, in Michigan v Mosley, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975), vacated the decision of the Michigan Court of Appeals and remanded for further proceedings. On remand, the Michigan Court of Appeals reversed Respondent's conviction on an instructional ground, but found his arrest to be proper. In lieu of granting Respondent's application for leave to appeal the Michigan Supreme Court then issued an opinion holding Respondent's arrest to have been without probable cause, and ruling, that based upon Brown v Illinois, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), Respondent's confession could not be admitted into evidence upon retrial.



### REASONS FOR GRANTING THE WRIT

The question presented by Petitioner is a substantial Federal Constitutional question, involving application of a recent case of this Court, which Petitioner submits has been clearly misconstrued and misapplied by the Michigan Supreme Court.

#### A.

The Michigan Supreme Court ruled that Respondent's arrest was without probable cause, and that Petitioner failed to demonstrate that the confession was free of the primary taint of the illegal arrest. People v Mosley, (After Remand) 400 Mich 181; 254 NW 2d 33 (1977). The court relied solely on Brown v Illinois, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), but failed to confront in any manner whatsoever the factors mentioned in Brown which, in conjunction with Miranda warnings, would demonstrate that the confession was not the result of exploitation of the illegal arrest. While Brown clearly stated that Miranda warnings do not per se purge the taint, the Court made it equally clear that the taint can be purged. Petitioner submits that when the factors discussed in Brown are applied to the undisputed facts of the instant case, it is plain that the confession was not obtained by exploitation of the illegal arrest.

The first factor discussed by the Court in Brown (other than Miranda warnings) was the "temporal proximity of the arrest and the confession." In Brown the arrest occurred at about 7:45 p.m.; the confession at 8:45 p.m. Respondent was arrested at 1:05 p.m., and confessed just after 6:35 p.m. Thus, the confession did not follow immediately on the heels of the arrest as it did in Brown, but after a five and one-half hour interval.

The second factor mentioned by the Court was "the presence of intervening circumstances." A crucial circumstance intervened after arrest but before Respondent's confession — Respondent's accomplice, one Anthony Smith, named Respondent as the shooter in the murder (Petitioner would note that this precise point was made to this Court in oral argument of Michigan v Mosley, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975), transcript of Argument p. 53). By the time Sergeant Hill questioned Respondent he had probable cause to arrest. See Harris v United States, 403 US 573; 91 S Ct 2075; 29 L Ed 2d 723 (1971). The decision of the Michigan Supreme Court would have the police release and rearrest Respondent where additional information giving probable cause is obtained in order to avoid exploitation of the initial arrest. Such facile maneuvering should not be required. As a matter of law, the acquisition of additional information giving rise to probable cause renders the subsequent interrogation free of the taint of the illegal arrest. In Brown this Court, when discussing intervening circumstances, wrote "See Johnson v Louisiana, 406 US 356; 92 S Ct 1620; 32 L Ed 2d 152 (1972)." A lineup subsequent to an unlawful arrest was held to be conducted by means sufficiently distinguishable to be purged of the primary taint in Johnson v Louisiana, where after the arrest and before the lineup, the defendant was arraigned and committed to jail by a magistrate. Certainly, where officers gain probable cause subsequent to and independent from the arrest, further action in the form of lineups or interrogation is purged of the primary taint. The Michigan Supreme Court erred in not recognizing that the intervening circumstance of the acquisition of probable cause renders the subsequent interrogation free of the primary taint of the illegal arrest.

The final factor considered by the Court in Brown, and the one to which this Court attached particular emphasis, was "the purpose and flagrancy of the

official misconduct." Giving special emphasis to the official conduct is only appropriate, given the purpose of Brown; that is, to deter Fourth Amendment violations.

The official misconduct in the instant case cannot be viewed as flagrant or purposeful — the trial judge ruled the arrest proper; the Michigan Court of Appeals ruled the arrest proper, splitting 2-1 on the issue; and the Michigan Supreme Court held the arrest improper. Of the judges who have reviewed the matter, then, seven have found the arrest improper and three have found it to be proper. Where judicial minds are in disagreement, and the arrest is upheld until reaching the state's highest court, it can scarcely be said that officers, not trained as legal technicians, purposefully and flagrantly violated the Constitution.

In this regard Petitioner would direct the Court to United States v Peltier, 422 US 531; 95 S Ct 2313; 45 L Ed 2d 374 (1975), where this Court said:

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence ...should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search [arrest] was unconstitutional under the Fourth Amendment.

See also United States v Calandra, 414 US 338, 348; 94 S Ct 613, 620; 38 L Ed 2d 561 (1974) (the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); Michigan v Tucker, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974) ("where the official action was pursued in complete good faith, the deterrence rationale loses much of its force"); and United States v Janis, \_\_\_ US \_\_\_; 49 L Ed 2d 1046, 1056

(1976) ("The Court...has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"). It cannot be said that the officers here had knowledge or may properly be charged with knowledge that the arrest was unconstitutional. To suppress valuable evidence in the absence of an insolvent use of authority and a showing of some incontestable compensating gain is thus wholly inappropriate. Michigan v Tucker, *supra*. The exclusionary rule should not apply to this case.

In sum, Petitioner submits that Brown was never intended as a vehicle to suppress confessions which are "Miranda-perfect," incontestably voluntary, removed in time from initial arrest, gained subsequent to the acquisition of information providing probable cause, and where the police misconduct in making the arrest was plainly not purposeful or flagrant. Petitioner would also point out that this case having once before been before the Court the record is clean and undisputed and the issue squarely presented. Petitioner urges that the Writ be granted to correct the error of the Michigan Supreme Court and to make plain that confessions should not be excluded on the basis of Fourth Amendment violations where application of the factors in Brown reveal that the taint, such as it was, has been purged.



**CONCLUSION**

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan Supreme Court is in conflict with the principles of Brown v Illinois such that plenary review should be granted.

Respectfully submitted,

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Dated: July 27, 1977.

**APPENDIX A**

**OPINION OF THE MICHIGAN COURT OF APPEALS,  
DIVISION I**

(People of the State of Michigan v Richard Bert Mosley)  
(No. 14318)

(Filed November 22, 1976)

Before: Danhof, C.J., and R.M. Maher and D.F. Walsh, JJ.

**ON REMAND FROM U.S. SUPREME COURT**

Danhof, C.J. On April 5, 1972, the defendant was found guilty by a jury on one count of felony murder in violation of MCLA 750.316; MSA 28.548.

The defendant having taken an appeal by right, this Court reversed his conviction and remanded the case for a new trial after having decided only a single issue. It was the conclusion of this Court that the defendant's confession had been obtained in violation of Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and was therefore improperly admitted. People v Mosley, 51 Mich App 105; 214 NW2d 564 (1974). Leave to appeal was denied by our Supreme Court, 392 Mich 764 (1974). Upon grant of the people's application for writ of certiorari, the United States Supreme Court vacated our holding and remanded the case for our further consideration. Michigan v Mosley, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975).

In his brief and supplemental brief, the defendant raises four meritorious issues which we now consider.

He first argues that although Michigan v Mosley is binding upon the courts of this state as the proper interpretation of the US Const, Am V, we are free to interpret the identical language found in Const 1963, art 1, § 17 as we feel is proper, and in doing so establish what he terms a "higher" standard. Such an action is not without precedent. See, for example, the holdings of the Michigan Supreme Court regarding illegal searches and seizures in People v Beavers, 393 Mich 554; 227 NW2d 511 (1975), double jeopardy protection in People v White, 390 Mich 245; 212 NW2d 222 (1973), and right to counsel in People v Franklin Anderson, 389 Mich 155; 205 NW2d 461 (1973).

We are unaware of any existing authority rooted in Michigan law, rather than upon Miranda, which provides that in such a factual setting a confession must be excluded, whether or not found voluntary.

It is our opinion that if such a rule is to be formulated, it is within the exclusive province of the Supreme Court to do so. In the absence of existing Michigan law to support the defendant's position, we hold that his confession is not to be excluded on the single ground of the police conduct complained of here. This is not to say that it is necessarily admissible. It is still subject to exclusion if made involuntarily or otherwise illegally obtained.

Defendant next contends that his confession should be excluded as a product of an illegal arrest under one of the rules of Wong Sun v United States, 371 US 471, 491; 83 S Ct 407; 9 L Ed 2d 441 (1963). Unlike the Miranda rule, which is designed to protect a defendant's Fifth Amendment right against self-incrimination, the rule of Wong Sun is designed to discourage disparagement of his or her Fourth Amendment right to remain free of illegal seizures of the person. Consequently, mere compliance with the rule of Miranda and showing of voluntariness of the confession

are not sufficient to render the confession admissible if it appears that the confession is a product of an illegal arrest. Brown v Illinois, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975). In order for us to sustain the defendant's contention, two requisites must be established: that the defendant was illegally arrested and that the statement made was not "sufficiently an act of free will to purge the primary taint", Brown, supra, 422 US at 597.

We have examined the record of the circumstances surrounding the defendant's arrest and conclude that the arrest of the defendant was made upon probable cause to believe that he was the perpetrator of one or more robberies and was, therefore, legal. Consequently, the confession that followed was not inadmissible on this ground.

The defendant's next assignment of error relates to the method by which the trial court submitted his confession to the jury. Having found at an early Walker hearing, People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965), that the confession had been voluntarily made, the court told the jury:

"THE COURT: Now, I think it is time for the Court to caution the jury as to what has happened here as to the statement.

"I have ruled, as a matter of law, that this statement was at the alleged time here, let's put it that way, was given freely and voluntarily.

"MR. ZIEMBA: Now, I object your Honor."

Later in his charge to the jury the court repeated his finding of the Walker hearing and instructed the jury that it was their function to decide whether the statement had in fact been made. The effect of the instructions delivered is to stamp upon the confession the endorsement of the court and substantially deprive



the defendant of his right to a jury determination of whether the statement had been made, and if so, the weight to be afforded it. Walker, supra. Upon this ground, the defendant is entitled to a new trial. People v Williams, 46 Mich App 165; 207 NW2d 480 (1973), People v Gilbert, 55 Mich App 168; 222 NW2d 305 (1974).

The defendant also assigns error to the unobjected-to failure of the trial court to instruct the jury on the elements of the underlying felony. We have held that even absent any objection, if commission of the underlying felony is substantially in issue, it is incumbent upon the court to instruct on its elements. Failure to so instruct may constitute manifest injustice. People v Jones, 66 Mich App 223; 238 NW2d 813 (1975), People v McGhee, 67 Mich App 12; 239 NW2d 741 (1976). The trial court is cautioned to, upon retrial, consider the impact of these decisions.

The defendant's conviction is reversed and the matter remanded to the trial court.

D.F. Walsh, J., concurred.

R.M. Maher, J. (concurring in part; dissenting in part). I agree with the majority's decision to remand for a new trial because the trial court improperly announced to the jury its finding that defendant's confession was voluntary. I cannot, however, agree with the majority's conclusion that defendant's arrest was legal.

In the opinions issued by the United States Supreme Court in Michigan v Mosley, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975), the legality of defendant's arrest was not reviewed. But both the majority opinion of Justice Stewart and the dissenting opinion of Justice Brennan noted the basis for defendant's arrest. Justice Stewart referred to the testimony of the arresting officer that "information supplied by an anonymous caller was the sole basis for his arrest of Mosley". 423 US at 97, fn 1. Justice Brennan, in dissent, pointed out

that an anonymous tip was "conceded by the Court to be the sole basis for Mosley's arrest". 423 US at 118 (dissenting opinion).

A review of the testimony taken at the hearing on defendant's motion to suppress his confession confirms the statements found in the Supreme Court opinions. The arresting officer testified that some time prior to defendant's arrest on April 8, 1971, he received an anonymous phone call while on duty at Detroit Police Headquarters. The caller named defendant as one of the persons involved in recent armed robberies on the city's lower east side.

On direct examination, the arresting officer was asked:

"Q. What information did you have that prompted you to arrest Richard Bert Mosley on that particular date?

"A. It was some time during the first week in April, got an anonymous phone call from—that—and the party gave me the name of several persons that were operating on the lower east side, holding up places and that, and the name of Richard Mosley and another party—two other men, I believe—that the information was that they had held up—."

On cross-examination, the officer testified:

"Q. At the conclusion of your conversation with this anonymous telephone caller, did you apply to any judge or magistrate for a warrant of arrest for Mr. Mosley?

"A. No, sir.

"Q. For what offense specifically did you arrest Mr. Mosley at 1:05 p.m. or thereabouts on April 8th of 1971?

"A. For investigation of the robbery armed of the Blue Goose Bar and the White Tower Restaurant on Mack.



"Q. Was the White Tower Restaurant mentioned to you during your telephone conversation with this anonymous caller?

"A. Yes.

"Q. And the Blue Goose Bar also?

"A. Yes.

"Q. Would it be fair to say, Sergeant Cowie, that you arrested Mr. Mosley on April 8th of 1971, solely and exclusively on the information that you received from this anonymous telephone caller?

"A. Yes."

The hearing on defendant's motion continued the next day. The arresting officer then produced "pattern sheets" to show that more than the anonymous phone call prompted defendant's arrest. The officer testified on direct examination that he had consulted descriptions from pattern sheets on recent lower east side robberies before he arrested defendant and that defendant matched several descriptions. The officer stated that defendant matched the description of the person involved in the March 25, 1971, robbery at the Night Party Store. The pattern sheet gave this description of the robber: 20s, 5-9, 130, afro, pencil mustache, medium complexion. The officer also stated that defendant matched the pattern sheet descriptions of two of the three men in the March 19, 1971, robbery at the Kercheval Market. One man was described as 20, 5-11, 160, dark complected, short hair. The other was described as 20, 5-6, 130, dark complected, trim mustache.

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1 Pattern sheets are synopses of recent crimes drawn from the accounts given by victims and witnesses and circulated internally by the police department.

The officer had testified the day before that he had arrested defendant for investigation of robberies at the Blue Goose Bar and at the White Tower Restaurant. He did not attempt on direct examination to match defendant with the pattern sheet descriptions of the persons involved in those incidents. On cross-examination, the officer stated that defendant could have fit the description given for the number 1 man at the White Tower robbery. That man was described as 20, 5-8, 150, light complected, medium afro.

The four pattern sheet descriptions that the officer stated he relied on were, in part, inconsistent. The Kercheval Market robbers were described as dark complected, the Night Party Store robber as medium complected and the White Tower Restaurant robber as light complected. Two robbers were described as having afros, one as having short hair. Two were described as having mustaches, while two were not. Where the descriptions were not obviously inconsistent, they were not very helpful. There are thousands of young black males of medium height and medium weight in Detroit.

Under these circumstances, I cannot find a valid warrantless arrest of defendant. An anonymous tip, which did not verify itself, cf. *Draper v United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959), even if combined with several general descriptions that could fit thousands of people in the area, does not provide the basis for a reasonable belief that defendant had committed the robberies under investigation. *Spinelli v United States*, 393 US 410; 89 S Ct 584; 21 L Ed 2d 637 (1969), *People v Walker*, 64 Mich App 138; 235 NW2d 85 (1975). Under *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), and *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975), admission of defendant's confession was error.

**APPENDIX B****OPINION OF THE MICHIGAN SUPREME COURT**

(People of the State of Michigan v Richard Bert Mosley)  
(After Remand)

(No. 59171)

(Filed June 2, 1977)

PER CURIAM. On April 5, 1972, the defendant was found guilty by a jury on one count of felony murder in violation of MCLA 750.316; MSA 28.548. The Court of Appeals reversed defendant's conviction, finding that defendant's confession had been obtained in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *People v Mosley*, 51 Mich App 105; 214 NW2d 564 (1974), leave to appeal denied 392 Mich 764 (1974). Upon grant of the people's application for writ of certiorari, the United States Supreme Court vacated that holding and remanded the case for further consideration. *Michigan v Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975).

The Court of Appeals reversed defendant's conviction and granted a new trial because the trial court improperly announced to the jury its finding that as a matter of law defendant's confession to the police was voluntary. The Court of Appeals refused to hold the defendant's arrest was illegal and that defendant's confession was a direct result of that illegal arrest. *People v Mosley (On Remand)*, 72 Mich App 289; 249 NW2d 393 (1976).

Defendant has filed an application for leave to appeal arguing that the police lacked probable cause to arrest him and that admission into evidence of his confession was error.

Defendant's arrest was based on an anonymous tip which did not verify itself. Cf. *Draper v United States*, 358 US 307; 79 S Ct 329; 3 L Ed 2d 327 (1959). The tip was not corroborated by other evidence providing a basis for a reasonable belief that defendant had committed the crime.

Defendant was taken to the police station immediately after his arrest and interrogated by the arresting police officer. A couple of hours later he was turned over to a homicide detective who interrogated defendant about the crime. Eventually defendant confessed. The record of the testimony taken at defendant's Walker hearing (see *People v Walker [On Rehearing]*, 374 Mich 331; 132 NW2d 87 [1965]) discloses that the police lacked probable cause to arrest defendant and that the people failed to sustain the burden of showing that the confession was free of the primary taint of defendant's illegal arrest. *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975). Admission into evidence of defendant's confession was error.

Pursuant to GCR 1963, 853.2(4), we affirm the judgment of the Court of Appeals reversing defendant's conviction and remanding the matter to the trial court and remand this matter to the trial court for further proceedings consistent with this opinion.

Kavanagh, C.J. and Williams, Levin, Coleman, Ryan, and Blair Moody, Jr., JJ., concurred.

Fitzgerald, J., took no part in the decision of this case.

Supreme Court, U. S.

FILED

SEP 12 1977

MICHAEL RODAK, JR., CLERK

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OCTOBER TERM 1977

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On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Michigan

**MEMORANDUM FOR RESPONDENT IN  
OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI**

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MEMORANDUM FOR RESPONDENT IN  
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—◆—

Respondent was charged with the commission of the offense of murder in the first degree. It was charged that he killed his victim in an armed robbery or in an attempt to perpetrate an armed robbery, a felony murder.

Respondent was arrested without warrant three months after the alleged crime was committed. The arresting officer testified that he received an anonymous telephone

call that several persons, including the defendant, were holding up places on the lower east side of Detroit and the caller mentioned the name of the deceased victim in this case.

During an evidentiary hearing in the trial court on respondent's motion seeking to suppress his confession, the arresting officer testified on direct examination by the prosecutor as follows:

'Q. What information did you have that prompted you to arrest Richard Bert Mosley on that particular date?

'A. It was some time during the first week in April, got an anonymous phone call from - that - and the party gave me the name of several persons that were operating on the lower east side, holding up places and that, and the name of Richard Mosley and another party - two other men, I believe - that the information was that they had held up --'

[See dissenting opinion of Maher, J, in Michigan Court of Appeals, page 17 of Petitioner's Petition.]

On cross-examination, the arresting officer testified as follows:

'Q. At the conclusion of your conversation with this anonymous telephone caller, did you apply to any judge or magistrate for a warrant of arrest for Mr. Mosely?

'A. No, sir.

'Q. For what offense specifically did you arrest Mr. Mosely at 1:05 p.m. or thereabouts on April 8th of 1971?

'A. For investigation of the robbery armed of the Blue Goose Bar and the White Tower Restaurant on Mack.

'Q. Was the White Tower Restaurant mentioned to you during your telephone conversation with the anonymous caller?

'A. Yes.

'Q. And the Blue Goose Bar also?

'A. Yes.

'Q. Would it be fair, Sergeant Cowie, that you arrested Mr. Mosely on April 8th of 1971, solely and exclusively on the information that you recieved from this ananymous telephone caller?

'A. Yes.' [See dissenting opinion of Maher, J, in Michigan Court of Appeals, pages 17-18 of Petitioner's Petition. Emphasis supplied.]

It was only after an over-night recess in the evidentiary hearing, that the arresting officer came up with testimony concerning 'pattern sheets' on armed robberies.

[See dissenting opinion of Maher, J, in Michigan Court of Appeals opinion, page 18, Petitioner's Petition.]

The arresting officer did not take respondent before a magistrate after arresting him at 1:00 p.m. because, he testified, he felt that he needed more information before he could apply for a warrant and because he hadn't completed his investigation. (E31) \*

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\* The E in the parentheses refers to the transcript of evidence adduced during the evidentiary hearing in the trial court on respondent's motion to suppress his confession; the numbers, to the pages within.

Upon his return to police headquarters with respondent, the arresting officer questioned respondent about several robberies, not including the robbery in question in this case. During this questioning period and after he had been advised of his *Miranda* rights and signed a form acknowledging that he had been told of his *Miranda* rights, respondent declined to answer *any questions about robberies*.

After the arresting officer had completed his questioning of respondent, the officer turned respondent over to another officer of the Detroit Police Department who was assigned to the homicide section. It is unclear from the transcripts whether the arresting officer had told the second officer that respondent had declined to answer any questions about robberies.

The second homicide officer gave respondent his *Miranda* rights and respondent signed a form acknowledging that such were given to him. The officer then told respondent that his purported accomplice had confessed and implicated respondent, putting respondent on the trigger, and that respondent faced a life term. Respondent then gave a purported confession.

It is interesting to note that Detective Hill, contrary to the assertion in Petitioner's Petition at page 5, testified on cross-examination on the evidentiary hearing as follows:

'A. I talked to Anthony Smith some time between 4 p.m. and some time after 4 p.m. and before 6:35 p.m. on the 8th of April. And we talked to him again and took a statement the next morning.

'Q. It's your testimony, then, sir, that you took a formal written so-called statement from Anthony Smith on April 9th?

'A. Yes, sir.' (E115)

[It is apparent to anyone who knows police interrogation technique that Sgt. Hill faked respondent by telling him that Smith had confessed, and that after Hill got respondent's confession in writing, Hill went to Smith the next morning, the 9th, and showed Smith respondent's confession and as a result, Smith confessed. This is evident from the fact that Hill had no explanation for the variation in his procedures: Smith confessed on the 8th but his confession was not reduced to writing; respondent confessed on the 8th and his confession was reduced to writing; on the morning of the 9th, Smith was shown respondent's written confession and Smith's written confession was obtained. (E117) ]

It must also be remembered that Anthony Smith's name was mentioned in the anonymous telephone call (E12), and that Anthony Smith was arrested on the same day as was respondent and was interrogated by the arresting officer alternately with respondent although Smith and respondent were not questioned in each other's presence (E36).

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The Michigan Supreme Court found in *People v Mosley* (After Remand), 400 Mich 181, 183 (1977) as follows:

'The record of the testimony taken at defendant's *Walker* hearing (see *People v Walker* [On Rehearing], 374 Mich 331 [1965]), discloses that the police lacked probable cause to arrest defendant and that the people failed to sustain the burden of showing that the confession was free of the primary taint of defendant's illegal arrest.'



In *Brown v Illinois*, 422 US 590, 600 (1975), this Court pointed out that:

'That Illinois courts refrained from resolving the question, as apt here as it was in *Wong Sun*, whether Brown's statements were obtained by exploitation of the illegality of his arrest.'

In the case at bar, the Michigan Supreme Court resolved the question, as is evident from the above quote from the opinion of the Michigan Supreme Court.

In *Brown v Illinois*, *supra*, at 605, this Court pointed out:

'The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning". App. 35, 43, 78, 81, 83, 88, 89, 94. The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.'

In the case at bar, the arresting officer testified at the evidentiary hearing that he arrested respondent 'solely and exclusively on the information that [he] received from this anonymous telephone caller' (E27); that he, the arresting officer, arrested respondent '[f]or investigation of the robbery armed of the Blue Goose Bar and the White Tower Restaurant' (E26); that he, the arresting

officer, while he had respondent in custody on the day of his arrest, did not request the issuance of an arrest warrant for respondent for the robbery of the Blue Gose Bar '[b]ecause it was learned that he wasn't involved in the robbery of the Blue Goose Bar' (E31); that he, the arresting officer, while he had respondent in custody shortly after his arrest, did not apply for a warrant of arrest for respondent for the robbery of the White Tower Restaurant because '[a]t 2:15 I hadn't had time to talk to him' (E31) and that he felt 'that [he] needed more information, before [he] could apply for a warrant for the armed robbery of the White Tower Restaurant' (E31); that he, the arresting officer, did not take respondent after his arrest before some judge in Recorder's Court [across the street from police headquarters where respondent was being held in custody] '[b]ecause [he] hadn't completed the investigation at 2:30' (E33); and that he, the arresting officer, after respondent had declined to answer any questions (E38), turned respondent over to Sgt. Hill 'for further questioning in the Leroy Williams thing' (E39) because he, the arresting officer, 'wasn't in charge of that investigation' (E39).

Sgt. Hill testified at the evidentiary hearing that after the arresting officer had interrogated respondent, he took respondent to the Homicide Section '[f]or interrogation' (E82) and that the arresting officer 'was turning [respondent] over to us for investigation regarding murder' (E84).

Hence, it is clear that in the case at bar, respondent was consciously arrested by the police and kept in custody specifically for the purpose of 'investigation' and for 'questioning'.

It is also clear that Sgt. Hill, the officer who obtained respondent's confession proceeded in calculated manner

to surprise, frighten and confuse respondent. Sgt. Hill testified at the evidentiary hearing that when he took Anthony Hill's oral statement before interrogating respondent, he did not think that 'we had a confession of guilt' from Smith (E129), but that nonetheless Sgt. Hill told respondent 'that Anthony Smith had confessed and implicated' respondent (E130); that Sgt. Hill had 'done it a lot of times when there has been no confession' (E130); that in response to the trial court's question whether Sgt. Hill 'was going to trick [respondent] into' confessing, Sgt. Hill said 'Well, I would tell them their partners have confessed' (E130), that 'I don't always tell a prisoner the truth' and that 'I would tell him [the prisoner] sometimes we have their fingerprints, and we don't have it, or something along this nature' (E131).

It can fairly be said that petitioner concedes that the arrest of respondent was illegal.

The question then is the precise question posited in *Wong Sun v United States*, 371 US 471, 488 (1963):

'[T]he more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint".'

In *Commonwealth of Pennsylvania ex rel. Craig v Maroney*, 348 F2d 22, 29 (CA3 1965), the Court said:

'There are two factors which seem to be of major significance in determining the relationship between an illegal arrest and, as here, the subsequent confession:

(a) the proximity of an initial illegal custodial act to the procurement of the confession; and

(b) the intervention of other circumstances subsequent to an illegal arrest which provide a cause so unrelated to that initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by, that illegal arrest.'

Applying these criteria, the Court in *United States ex rel. Gockley v Myers*, 450 F2d 232, 236 (CA3 1971), in ordering the suppression of the defendant's confession obtained during a custodial questioning following an illegal arrest, said:

'The arrest of Gockley on November 17 was much more than a *causa sine qua non* of his November 19 statement during the resulting detention. The record compels the conclusion that the very purpose of the arrest on a charge of forgery was to obtain and maintain such control over him as would facilitate persistent and effective interrogation about the disappearance of Smith and Miss Klein. This deliberate misuse of arrest is underscored by the fact that Gockley was never granted an arraignment or a bail hearing on the forgery charge. . . . Moreover, much of the questioning was addressed to the obtaining of information about the disappearance of Smith and Miss Klein, rather than the forgery charge upon which he never was prosecuted.'



In the case at bar, it should be noted, the confession followed in a matter of hours after the illegal arrest, not two days later, and that the arresting officer did not release respondent after the officer knew he had insufficient evidence to obtain a warrant on the charges for which he had arrested respondent and after respondent declined to answer any questions, but rather, the arresting officer continued respondent in custody and deliberately turned him over to another officer specifically for questioning in connection with a murder for which respondent was not arrested.

In *Hale v Henderson*, 485 F2d 266, 268 (CA6 1973), cert denied 415 US 930, the district judge found that the arrest of petitioner was illegal but that his confession was not the product of the illegal arrest because it was made approximately 42 hours after the arrest and after petitioner had talked privately with his wife and had been confronted with all of the witnesses, but the Court found otherwise:

'In our instant case there was no break in custody (and apparently little break if any in custodial interrogation, . . . prior to petitioner's confession. Contrary to the holding of the District Judge, we do not believe that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint'." *Wong Sun v United States*, *supra* . . . The confrontations which preceded the statement were made possible by and were a product of the illegal arrest.'

In the case at bar, the confronting of respondent by Sgt Hill with the information that Anthony Hill had incriminated respondent - whether it was a trick by Hill

or whether Anthony Hill had actually made that statement at that time - was made possible by the illegal arrest of respondent and was a product of that illegal arrest.

In *United States v Edmons*, 432 F2d 577, 583, 584 (CA2 1970), where the defendants sought to suppress identifications obtained as a result of their illegal arrests, the Court in ordering the suppression of the identifications, said:

'The arrests here violated the Fourth Amendment not because law enforcement officers crossed the line, often a shadowy one, that separates probable cause from its lack, but because they deliberately seized the appellants on a mere pretext for the purpose of displaying them to the agents who had been present at the scene of the crime.

\* \* \*

'Here the illegal arrests produced the precise results for which they were designed. When the police, not knowing the perpetrator's identity, make an arrest in deliberate violation of the Fourth Amendment for the very purpose of exhibiting a person before the victim and with a view toward having any resulting identification duplicated at trial, the fulfillment of this objective is as much an exploitation of "the primary illegality" as where a defendant is arrested without probable cause in the expectation that a search or the taking of fingerprints . . . will yield evidence that will convict him of a crime and the illegally seized objects or fingerprints are introduced at trial.'



And in the case at bar, the illegal arrest of respondent produced the precise result for which it was designed, and the illegality of the arrest of respondent was not the crossing of the line, often a shadowy one, between probable cause and its lack, but was based solely on an anonymous telephone call, and the illegal detention of respondent was continued after it was clear that there was no evidence against him on the charges for which he was arrested for the specific purpose of his being questioned about the murder to which his confession related.

This Court in *Brown v Illinois*, *supra*, stated that the burden was on the prosecution to show that the confession was admissible.

The Michigan Supreme Court, after considering the record made in the case in the trial court, determined that 'the people failed to sustain the burden of showing that the confession was free of the primary taint of defendant's illegal arrest'. 400 Mich at 183.

This determination was patently correct.

Therefor, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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